

§ 320.42

submitted orally or in writing, as the Board may indicate in each case, and shall be subject to such restrictions as to form, subject matter, length, and time as the Board may indicate.

§ 320.42 Decision of Board.

The decision of the Board, whether on an appeal to the Board from a decision of a hearings officer, or after submission of a report by a hearings officer, shall be made upon the basis of the record established in accordance with the foregoing sections. Notice of such decision, together with the Board's findings of fact and conclusions of law in connection therewith, shall, within 15 days from the date on which the decision is made, be mailed to the parties at the latest addresses furnished by them. Subject only to judicial review in accordance with § 320.45, the decision of the Board shall be final and conclusive for all purposes:

(a) With respect to the initial determination involved, and

(b) With respect to other initial determinations, irrespective of whether they have been appealed, which involve the same parties and which were based on the same issue or issues determined in the decision of the Board. In a case in which there has been a hearings officer's report, in an appeal involving employee status or the creditability of compensation, the decision of the Board on all issues determined in such decision shall be final and conclusively establish all rights and obligations, arising under the Act, of every party notified as hereinabove provided of his or her right to participate in the proceedings.

[Board Order 66-84, 31 FR 10181, July 28, 1966, as amended at 56 FR 65681, Dec. 18, 1991]

§ 320.45 Judicial review.

Upon being notified of a decision of the Board made (a) upon review, on the Board's own motion, of a decision of a hearings officer, or (b) upon an appeal to the Board, an aggrieved party may obtain judicial review of such final decision, by filing a petition for review within ninety days after the date on which notice of such decision was mailed to him, or within such further time as the Board may allow, in the U.S. Court of Appeals for the circuit in

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which the party resides or will have had his principal place of business or principal executive office, or in the U.S. Court of Appeals for the Seventh Circuit or in the Court of Appeals for the District of Columbia.

[Board Order 58-142, 23 FR 9090, Nov. 22, 1958, as amended at 56 FR 65682, Dec. 18, 1991]

§ 320.48 Representatives of parties.

In the event a party to any proceeding within the Board, under the preceding regulations in this part, desires to be represented by another person, he shall file with the Board prior to the time of such representation a power of attorney signed by him and naming such other person as the person authorized to represent him: *Provided, however,* That without requiring such power of attorney the Board may recognize as the duly authorized representative of the claimant the person designated by the claimant's railway labor organization to act in behalf of members of that organization on such matters whenever such representative acts or appears for such claimant.

§ 320.49 Determination of date of filing.

For purposes of this part the date of filing of any document or form shall be the date of receipt at an office of the Board. By agreement between a base-year employer and the Board any document required to be filed with the Board or any notice required to be sent to the employer may be transmitted by electronic mail.

[56 FR 65682, Dec. 18, 1991]

PART 322—REMUNERATION

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AUTHORITY: 45 U.S.C. 3621.

Railroad Retirement Board

§ 322.3

SOURCE: Board Order 59-73, 24 FR 2487, Mar. 31, 1959, unless otherwise noted.

§ 322.1 Statutory provisions.

Subject to the provisions of section 4 of this act, (1) a day of unemployment, with respect to any employee, means a calendar day * * * with respect to which * * * no remuneration is payable or accrues to him * * *; and (2) a "day of sickness", with respect to any employee, means a calendar day * * * with respect to which * * * no remuneration is payable or accrues to him * * *. *Provided, however,* That "subsidiary remuneration", as hereinafter defined in this subsection, shall not be considered remuneration for the purpose of this subsection except with respect to an employee whose base-year compensation, exclusive of earnings from the position or occupation in which he earned such subsidiary remuneration, is less than \$1,000 * * *.

For the purpose of this subsection, the term "subsidiary remuneration" means, with respect to any employee, remuneration not in excess of an average of three dollars a day for the period with respect to which such remuneration is payable or accrues, if the work from which the remuneration is derived (i) requires substantially less than full time as determined by generally prevailing standards, and (ii) is susceptible of performance at such times and under such circumstances as not to be inconsistent with the holding of normal full-time employment in another occupation. (Section 1(k), Railroad Unemployment Insurance Act.)

The term "compensation" means any form of money remuneration, including pay for time lost but excluding tips, paid for services rendered as an employee to one or more employers, or as an employee representative * * *. A payment made by an employer to an individual through the employer's payroll shall be presumed, in the absence of evidence to the contrary, to be compensation for service rendered by such individual as an employee of the employer in the period with respect to which the payment is made. An employee shall be deemed to be paid, "for time lost" the amount he is paid by an employer with respect to an identifiable period of absence from the active service of the employer, including absence on account of personal injury, and the amount he is paid by the employer for loss of earnings resulting from his displacement to a less remunerative position or occupation. If a payment is made by an employer with respect to a personal injury and includes pay for time lost, the total payment shall be deemed to be paid for time lost unless, at the time of payment, a part of such payment is specifically apportioned to factors other than time lost, in which event only such part of the payment as is not so apportioned shall be deemed to be paid for

time lost. * * * (Section 1(i), Railroad Unemployment Insurance Act.)

The term "remuneration" means pay for services for hire, including pay for time lost, and tips, but pay for time lost shall be deemed earned on the day on which such time is lost. The term "remuneration" includes also earned income other than for services for hire if the accrual thereof in whole or in part is ascertainable with respect to a particular day or particular days. The term "remuneration" does not include (i) the voluntary payment by another, without deduction from the pay of an employee, of any tax or contribution now or hereafter imposed with respect to the remuneration of such employee, or (ii) any money payments received pursuant to any nongovernmental plan for unemployment insurance, maternity insurance, or sickness insurance. (Section 1(j), Railroad Unemployment Insurance Act.)

[Board Order 59-73, 24 FR 2487, Mar. 31, 1959, as amended by Board Order 59-199, 24 FR 9478, Nov. 25, 1959; Board Order 68-72, 33 FR 11114, Aug. 6, 1968]

§ 322.2 General definition of "remuneration".

Remuneration includes all pay for services for hire and all other earned income payable or accruing with respect to any day. Income shall be deemed earned if it is payable or accrues in consideration of services and if such services were in turn rendered in consideration of the income payable or accruing. "Remuneration" shall include income in the form of a commodity, service, or privilege if, before the performance of the service for which it is payment, the parties have agreed (a) upon the value of such commodity, service, or privilege, and (b) that such part of the amount agreed upon to be paid may be paid in the form of such commodity, service, or privilege.

§ 322.3 Determining the days with respect to which remuneration is payable or accrues.

(a) *Payable or accrues.* In determining whether remuneration is "payable" or "accrues" to an employee with respect to a claimed day or days, consideration shall be given to such factors as

(1) The intention of the parties with respect to the remuneration as indicated in employment contracts, in any expressed or implied agreements between the parties, and by the actions of the parties;

(2) Any evidence, such as vouchers or agreement of the parties, relating the remuneration to a particular period of time or indicating that the remuneration accrued or became payable without reference to any particular period of time;

(3) The measure by which the amount of remuneration was determined;

(4) Whether the amount of the remuneration is proportionate to the length of time needed to render the service for which it is payment;

(5) Whether the service for which the remuneration accrues is required to be rendered on any particular day or particular days; and

(6) Whether a specified amount of the remuneration is contingent upon a result accomplished on a particular day or particular days.

(b) *Layover days.* Remuneration shall not be regarded as payable or accruing with respect to "layover" days, solely because they are termed "layover" days.

(c) *Guaranteed earnings.* A payment under a plan which guarantees an amount of earnings or mileage in a specified period is remuneration with respect to each day in the specified period.

§ 322.4 Consideration of evidence.

(a) *Initial proof.* A claimant's certification or statement on a claim form provided by the Board to the effect that he did not work on any day claimed and did not receive income such as vacation pay or pay for time lost for any day claimed on such form shall constitute sufficient evidence that no remuneration is payable or has accrued to him with respect to such day, unless there is conflicting evidence.

(b) *Investigation.* When there is a question as to whether or not remuneration is payable or has accrued to a claimant with respect to a claimed day or days, investigation shall be made with a view to obtaining information sufficient for a finding.

(Approved by the Office of Management and Budget under control number 3220-0049)

[Board Order 59-73, 24, 2487, Mar. 31, 1959, as amended at 52 FR 11017, Apr. 6, 1987]

§ 322.5 Payments under vacation agreements.

(a) *General.* In ascertaining the accrual of remuneration under a vacation agreement, consideration shall be given to the applicable agreements and practices, the interpretations of such agreements and practices developed by the parties, and the actions of the parties pursuant thereto. When there is information that an employee has received or is to receive payment under a vacation agreement, such payment shall, in the absence of evidence to the contrary, be considered to be remuneration with respect to the days to which the payment is assigned.

(b) *Vacation pay.* If an employee takes a vacation in accordance with a vacation agreement, the payment for such vacation shall constitute remuneration with respect to the days in the vacation period for which the payment is made. An employee shall be regarded as taking a vacation when, in accordance with the applicable agreements and practices (1) he is absent from work during a scheduled or assigned vacation period; (2) he is required to take his vacation with pay while he is on furlough; or (3) he chooses to take his vacation with pay while he is unemployed or absent from work due to illness or other personal circumstances.

(c) *Pay in lieu of vacation.* If a payment in lieu of vacation is made to an employee under a vacation agreement such payment shall not constitute remuneration with respect to any particular day or days. A payment under a vacation agreement shall be regarded as in lieu of vacation if:

(1) The payment is made at the end of the vacation year to an employee who did not take his vacation during such year; or

(2) The payment is made after the employee's death, or after he ceased service for the purpose of receiving an annuity, and the payment is credited to the employee's last day of service in accordance with § 222.3(h) of this chapter; or

(3) It is otherwise established that the parties intended the payment to be in lieu of vacation, without reference to any particular period.

§ 322.6 Pay for time lost.

(a) *Payments included.* A payment shall be regarded as “pay for time lost” if it is made with respect to an identifiable period of absence from the active service of the person or company making such payment, including absence on account of personal injury. The entire amount of a payment made by an employer with respect to a personal injury shall be deemed to be pay for time lost if such amount includes pay for time lost and is not, at the time of payment, specifically apportioned to factors other than time lost. If an amount paid with respect to personal injury is, at the time of payment, apportioned to factors other than time lost, only that part of the amount not so apportioned shall be deemed to be pay for time lost.

(b) *Employment relationship required.* Pay for time lost shall not be deemed to have been earned on any day after the day of the employee’s resignation or other termination of his employment relationship.

(c) *Initial evidence.* A report that an employee has received or is to receive pay for time lost shall, in the absence of evidence to the contrary, be considered sufficient for a finding that remuneration is payable with respect to each day in the period to which the pay is assigned.

§ 322.7 Allowances resulting from abandonment or coordination of employer facilities.

(a) *Coordination or dismissal allowance.* A coordination or dismissal allowance, payable to an employee who is unemployed as a result of an abandonment or coordination, but who does not sever his employment relationship and who remains subject to call, is remuneration with respect to each day in the period for which the allowance is paid. Pursuant to instructions issued by the Associate Executive Director for Unemployment and Sickness Insurance, any Board office that is adjudicating a claim for unemployment benefits is authorized to deny such claim if that office finds that the employee is receiving or is eligible to receive a monthly dismissal or coordination allowance or any comparable payment of remuneration with respect to any of the days covered by the claim for benefits. It

shall be the duty of each employer to provide such information as the Board may need to adjudicate the claim for benefits made by an employee who is receiving or is eligible to receive such allowances or other pay for time lost.

(b) *Separation allowance.* A separation allowance, payable to an employee who, in accordance with the applicable agreement, elects to sever his employment relationship and receive a lump-sum settlement in lieu of a coordination allowance is not remuneration with respect to any day after the employment relationship is severed.

[Board Order 59-73, 24 FR 2487, Mar. 31, 1959, as amended at 50 FR 36872, Sept. 10, 1985]

§ 322.8 Miscellaneous income.

(a) *Income from self-employment.* In determining whether income from self-employment is remuneration with respect to a particular day or particular days, consideration shall be given to whether, and to what extent, (1) such income can be related to services performed on the day or days and (2) the expenses of the self-employment can be attributed to the day or days. Income from services performed by an individual on a farm which he owns or rents, or in his own mercantile establishment, ordinarily is not remuneration with respect to any day.

(b) *Income from investment.* Income in the form of interest, dividends, and other returns on invested capital which is not coupled with the rendition of personal services shall not be regarded as remuneration.

(c) *Commissions on sales.* Commissions on sales shall be regarded as remuneration with respect to the day or days on which sales are made.

(d) *Payments for service as a public official.* In determining whether income for service as a public official is remuneration and, if so, the particular day or days with respect to which such remuneration is payable or accrues, consideration shall be given to such factors as (1) the amount of the income; (2) the terms and conditions of payment; (3) the character and extent of the services rendered; (4) the importance, prestige, and responsibilities attached to the position; (5) the day or days on which services, or readiness to perform

services, are required; and (6) the provisions of the applicable statutes.

(e) *Payments to local lodge officials.* A payment by a local lodge of a labor organization to an employee for services as a local lodge official shall be regarded as subsidiary remuneration if such payment does not exceed an average of three dollars a day for the period with respect to which it is payable or accrues, unless there is information that the work from which the payment is derived does not require substantially less than full time as determined by generally prevailing standards, or is not susceptible of performance at such times and under such circumstances as not to be inconsistent with the holding of normal full-time employment in another occupation.

(f) *Public relief payments.* Public relief payments made in consideration of need shall not be regarded as remuneration.

PART 323—NONGOVERNMENTAL PLANS FOR UNEMPLOYMENT OR SICKNESS INSURANCE

Sec.

323.1 Introduction.

323.2 Definition of nongovernmental plan for unemployment or sickness insurance.

323.3 Standards for Board approval of a nongovernmental plan.

323.4 Guidelines for content of a nongovernmental plan.

323.5 Submitting proposed plan for Board approval.

323.6 Treatment of benefit payments under a nongovernmental plan for purposes of contributions.

323.7 Effective date.

AUTHORITY: 45 U.S.C. 362(1).

SOURCE: 56 FR 26328, June 7, 1991, unless otherwise noted.

§ 323.1 Introduction.

(a) This part defines the phrase *nongovernmental plan for unemployment or sickness insurance* and sets forth the procedure by which an employer may obtain a determination by the Railroad Retirement Board as to whether a particular plan that such employer maintains for its employees qualifies as a nongovernmental plan. In general, any payment by an employer to an employee for services rendered as an employee will be considered to be *remu-*

neration within the meaning of section 1(j) of the Railroad Unemployment Insurance Act and part 322 of this chapter. This includes employer payments that relate to an employee's loss of earnings during a period of time when the employee is unemployed or sick, including sickness resulting from injury. The exception is when an employer pays an employee a benefit pursuant to the provisions of a nongovernmental plan for unemployment or sickness insurance established by an employer for the benefit of its employees. Benefit payments under such plans are not remuneration and do not affect an employee's eligibility for unemployment or sickness benefits under the Railroad Unemployment Insurance Act.

(b) This part does not have any general applicability to private insurance contracts under which an insurance company, pursuant to a policy of insurance maintained by or for an employee, pays medical or hospital expenses or other cash benefits to or in behalf of an employee. Nor does this part apply to any private plan for relief of unemployment established by a party other than an employer such as, for example, a plan established by a labor union under which it undertakes to pay benefits to striking members of the union out of a strike insurance fund. Insurance policy benefits and strike unemployment benefits, although paid under plans that are nongovernmental in nature, are not considered remuneration for services under the general definition of *remuneration*. See part 322 of this chapter.

§ 323.2 Definition of nongovernmental plan for unemployment or sickness insurance.

A nongovernmental plan for unemployment or sickness insurance is a benefit plan, program or policy that is in the nature of insurance and is designed and established by an employer for the purpose of supplementing the benefits that an employee of such employer may receive under the Railroad Unemployment Insurance Act during a period of unemployment or sickness. A nongovernmental plan may be established by labor-management agreement or by unilateral employer action. Payments under such plans are referred to